Supreme Court, U. S.
FILED
FEB 5 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1112

GULF OIL COMPANY - U.S., a corporation, a/k/a GULF OIL CORPORATION, a corporation, and THE PITTSBURG & MIDWAY COAL MINING CO., a corporation,
Petitioners,

vs.

PALMER COAL & ROCK COMPANY, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

LEONARD O. THOMAS
J. D. LYSAUGHT
DAVID K. FROMME
Of the Firm of
WEEKS, THOMAS, LYSAUGHT, BINGHAM & MUSTAIN, CHARTERED
Home State Bank Building
Minnesota Avenue at Fifth
Kansas City, Kansas 66101
and
DONALD E. WILLSON
1720 South Bellaire Street
Denver, Colorado 80222
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

Opinions Below 1

Statement of Grounds on Which Jurisdiction Is Invoked 2

Question Presented 2

Constitutional Provisions, Statutes and Rules Involved 2

Statement of the Case 3

Reasons for Granting the Writ—

The Court Below Is Testing The Legal Sufficiency Of Evidence In Common Law Actions Where Jurisdiction Is Based Upon Diversity, By A Standard Which Would Not Have Been Applied Had The Action Been Filed In State Court, And Is Refusing To Apply State Rules Defining The Sufficiency Of The Evidence To Support Such Cause Of Action .. 8

Conclusion 17

Certification 18

Appendix—

Orders of the United States Court of Appeals, Tenth Circuit A1

Opinion of the United States Court of Appeals, Tenth Circuit A4

Memorandum Opinion of the United States District Court for the District of Kansas A12

Table of Authorities

CASES

Alman Bros. Farms & Feed Mill, Inc. v. *Diamond Lab., Inc.*, 437 F.2d 1295 (5 Cir. 1971) 10

Asheim v. *Pigeon Hole Parking, Inc.*, 283 F.2d 288 (9 Cir. 1960) 10

Byrd v. *Blue Ridge Rural Elect. Coop.*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958) 9
Calloway v. *Central Charge Serv.*, 440 F.2d 287 (D.C. Cir. 1971) 9-10
Calvert v. *Katy Taxi, Inc.*, 413 F.2d 841 (2 Cir. 1969) 10
Chicago, R. I. & Pac. Railway Co. v. *Howell*, 401 F.2d 752 (10 Cir. 1968) 10-11
Cities Service Oil Co. v. *Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939) 12
Clay County Cotton Co. v. *Home Life Insurance Co.*, 113 F.2d 856 (8 Cir. 1940) 10
Dick v. *New York Life Ins. Co.*, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959) 9, 11, 12
Erie R. Co. v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1189 (1938) 8, 9, 15, 16
Fox v. *Wilson*, 211 Kan. 563, 507 P.2d 252 (1973) 11, 12
Guaranty Trust Co. v. *York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945) 8-9
Hanna v. *Plummer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965) 9, 17
Hardware Mutual Ins. Co. of Minnesota v. *Jacob Hieb, Inc.*, 146 F.2d 447 (8 Cir. 1945) 10
Illinois State Trust Co. v. *Terminal R. Assn. of St. Louis*, 440 F.2d 497 (7 Cir. 1971), cert. denied 404 U.S. 855, 92 S.Ct. 100, 30 L.Ed.2d 96 10
In re Estate of Shirk, 194 Kan. 424, 399 P.2d 850 (1965) 11, 12
Jackman v. *Development Co.*, 106 Kan. 59, 187 Pac. 258 (1920) 12
Long Bros. v. *West & Co.*, 31 Kan. 298, 1 Pac. 545 (1884) 11
McCabe v. *Bagby*, 186 F.2d 546 (6 Cir. 1951) 10

Minnesota Avenue, Inc. v. *Automatic Packagers, Inc.*, 211 Kan. 461, 507 P.2d 268 (1973) 12
Moskowitz v. *Peariso*, 458 F.2d 240 (6 Cir. 1972) 10
Mr. Steak, Inc. v. *River City Steak, Inc.*, 460 F.2d 666 (10 Cir. 1972) 10
O'Connor v. *Pennsylvania R. Co.*, 308 F.2d 911 (2 Cir. 1962) 10
O'Day v. *Chicago River & I. R. Co.*, 216 F.2d 79 (7 Cir. 1954) 9
Oldenburg v. *Clark*, 489 F.2d 839 (10 Cir. 1974) 10
Palmer Coal & Rock Co. v. *Gulf Oil Company - U.S.*, 524 F.2d 884 (1975) 8, 13, 14
Palmer v. *Ford Motor Co.*, 498 F.2d 952 (10 Cir. 1974) 10
Palmer v. *Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1942) 11-12
Ragan v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 93 L.Ed. 1520 (1946) 15
Reeder v. *Guaranteed Foods, Inc.*, 194 Kan. 386, 399 P.2d 822 (1965) 13
Roche v. *New Hampshire Nat. Bank*, 192 F.2d 203 (1 Cir. 1951) 9
Schneider v. *Chrysler Motors Corp.*, 401 F.2d 549 (8 Cir. 1968) 10
Sipes v. *Crum*, 204 Kan. 591, 464 P.2d 1 (1970) 12
Smith v. *Mill Creek Court, Inc.*, 457 F.2d 589 (10 Cir. 1972) 10
Stoner v. *New York Life Ins. Co.*, 311 U.S. 464, 61 S.Ct. 336, 85 L.Ed. 284 (1940) 9
Stopper v. *Manhattan Life Ins. Co.*, 241 F.2d 465 (7 Cir. 1957), cert. den. 355 U.S. 815, 78 S.Ct. 17, 2 L.Ed.2d 32 10

Swearngin v. *Sears Roebuck & Co.*, 376 F.2d 637 (10 Cir. 1967) 10
U.S. for Use and Benefit of Weyerhaeuser Co. v. *Bucon Constr. Co.*, 430 F.2d 420 (5 Cir. 1970) 9
Waldron v. *Aetna Casualty & Surety Co., Inc.*, 141 F.2d 230 (3 Cir. 1944) 10

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States, Amendment 7 ..... 2, 9
K.S.A. 60-416 11
28 U.S.C. 1254(1) 2
28 U.S.C. 1652 ..... 3, 8

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-.....

GULF OIL COMPANY - U.S., a corporation, a/k/a GULF OIL CORPORATION, a corporation, and THE PITTSBURG & MIDWAY COAL MINING CO., a corporation,
Petitioners,

vs.

PALMER COAL & ROCK COMPANY, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above case on November 3, 1975, with petition for rehearing denied December 19, 1975.

OPINIONS BELOW

The memorandum opinion of the District Court for the District of Kansas, ruling upon posttrial motions, was unpublished and appears in the Appendix at pp. A12-A15. The opinion of the Court of Appeals for the Tenth Circuit is reported at 524 F.2d 884 (1975), and appears in the Appendix at pp. A4-A12.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) Review is sought of the judgment of the Court of Appeals for the Tenth Circuit entered upon November 3, 1975.

(ii) The order of the Court of Appeals denying the petition for rehearing was dated and entered December 19, 1975. The Court's mandate has been recalled and stayed by the Court's order dated and entered January 8, 1976. These orders are appended to this petition at pp. A1-A3.

(iii) 28 U.S.C.A. 1254(1) confers on this Court jurisdiction to review the judgment in question by writ of certiorari.

QUESTION PRESENTED

Can a Federal Court in a diversity case for common law fraud disregard the applicable state rule of law requiring a clear and convincing degree of proof and apply a preponderance of the credible evidence rule of degree of proof?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Constitution, Amendment 7:

"In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

28 U.S.C. 1652:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

STATEMENT OF THE CASE

Respondent (plaintiff below) was a Kansas corporation which operated a coal mine upon a leased tract of land in Missouri. In 1966, 1967 and 1968, it obtained substantial loans from the Small Business Administration. In July, 1968, after making two payments on the consolidated loan, plaintiff defaulted, and thereafter the SBA foreclosed. Plaintiff then brought this action against petitioners (defendants below) for damages upon the theory of common law fraud or deceit. The only basis of federal jurisdiction was diversity of citizenship. The case was tried in the United States District Court for the District of Kansas. After a trial of six days, the jury returned a verdict for the plaintiff in the amount of $500,000.00 actual, and $1,500,000.00 punitive damages. After hearing posttrial motions, the Court found the jury's verdict supported by evidence only to the extent of $466,831.50, representing the amount of outstanding debts and the investments of the shareholders of plaintiff. The Court modified the judgment to that extent and otherwise approving the verdict and judgment of punitive damages. Petitioner appealed, and the Tenth Circuit affirmed.

Defendant, The Pittsburg & Midway Coal Mining Company (P & M), was a subsidiary of defendant, Gulf Oil

Company. P & M was exploring coal-bearing lands in Kansas and Missouri for the purpose of assembling a minable coal field of thirty to forty million tons of marketable coal. Land agents were seeking options on coal-bearing lands with permission to test drill. In early 1968, about the time when plaintiff had consolidated its loans, P & M began taking options on land in a four-county area of Kansas and Missouri, including land near plaintiff's leasehold. When Mr. Card, a Vice President of plaintiff, learned of defendant's activities, he arranged a meeting with Mr. James Miner, Vice President of P & M in charge of land acquisition.

Card's version of Miner's statements at this meeting formed the basis for plaintiff's claim of fraudulent misrepresentation.

No issue was taken with regard to Mr. Card's testimony as to the initial portion of the conversation. There was no significant dispute or conflict in the evidence regarding it:

> " 'Q. And after introducing yourselves to one another, what did you do? A. Sit down and had coffee.
>
> " 'Q. Now, I would like to have you in your own words but as accurately as you can, tell the jury what you said to him and later what he said to you and we will see where we are. A. Well, I shook hands and we set (sic) down to have coffee. I told him about our mine. As I remember, he didn't know there was a mine there and I explained to him approximately where we were, what we were doing and how long we had been in the business. It was a congenial conversation on the mine. I told him we were very small, that we had borrowed money from the government to

> get started, we were trying to create some employment in the area because it lacked any industry at all. Naturally, we wanted to make a profit out of it and would like to get larger as we went along. By Gulf becoming interested in the area, I couldn't see how in the world we could compete with them and I asked him if this is what we had to do. He said, "We have no intention whatsoever"—
>
> * * *
>
> " 'A. He said, "I have no intentions of harming you in any way, shape or form. We don't believe in that. There is plenty of coal land, I believe, in this area. We are in dire need of additional coal reserves for our future operations and we had been in this area maybe twenty years ago but mining techniques have changed and I believe this coal here can be profitable so we would like to acquire all the reserves we can in this area."
>
> " 'I asked him what restrictions in areas he meant and he had no boundaries on it at all at that time. Any coal bearing lands in the area. He said, "As I say, we have no desire to hurt you in any way. You are familiar with the area," * * *
>
> * * *
>
> " 'He told me that we could be of great help to them in the area by being familiar with it, No. 1, knowing the people that were involved around the area, we were acquainted with them, most of the people in this small area, that we could be an asset to Gulf in acquiring these reserves and if we could cooperate, he would set aside or carve out whatever coal was needed by us if we wanted to continue and stay in the coal business.

" 'At that time I told him I thought we would like to stay in the coal business and by him protecting us on future reserves, I thought it would be a great deal.' " (Apx. 26-30).

Mr. Miner also testified that he had assured Mr. Card that P & M would protect plaintiff's future reserves by setting aside or carving out needed coal reserves. At no time thereafter, however, did plaintiff ever lack coal reserves or request that defendant assist plaintiff in this regard.

It therefore was Mr. Card's version of the *final* portion of the conversation which was crucial to plaintiff's case:

" 'He said if we weren't quite satisfied with the situation, *could even be* that they would just take us out of business or buy us out of business, if this was our desire, *provided that they took the field, if they bought the field.* So I told him it sounded like a good agreement but I would appreciate it if he would go over to my banker with me. I said, "This being a small area, the rumor gets out about Gulf, it will scare the banker and we owe him the money. Would you go over and tell him what you just told me?" He said, "Harold, I would even put it in writing but I would rather not. It would constitute more problems and I just would not rather." I said, "I have no reason not to trust you, sir, but if you will go to the bank with me so my banker won't become upset, that's fine." So we finished our coffee, went directly to the bank from there.

" 'He repeated almost verbatim what he told me. The banker and I listened to him, we spent about forty or forty-five minutes in the banker's office.' " (Apx. 29-30; emphasis added).

Also, during cross-examination, Mr. Card testified:

" 'Q. Just to make sure I understand this arrangement that you have testified to and the fact that this was conditioned upon Gulf putting a field together, this was a condition precedent to any agreement that you claim to have made was the putting together of a coal field by Gulf Oil Corporation in the Fort Scott-Garland area? A. *Yes, if they purchased the field.*' " (Apx. 53; emphasis added).

Miner denied any discussion of buying plaintiff out. There was little dispute that after this meeting plaintiff cooperated and aided P & M in scouting coal lands.

After plaintiff's default on the SBA loan, and the threatened foreclosure, Card demanded that defendant "live up to" its agreement and "buy out" or "bail out" plaintiff. At no time prior thereto had any specific price been discussed.

The evidence of both parties further disclosed that in 1968 and 1969, defendant acquired a large number of option agreements, and in fact exercised certain of the options, but that others were dropped. The evidence was clear that defendant in fact was never able to acquire sufficient coal lands to constitute the contemplated field.

At the trial of this case, by way of motions for a directed verdict and for judgment notwithstanding the verdict, defendant raised, *inter alia,* the issue whether plaintiff's evidence met the standard or requirement under Kansas law that it be clear and convincing. When the issue was presented to the Court of Appeals, however, the Court disregarded the Kansas rule and applied a different standard. The Court of Appeals merely "view[ed] the evidence from a credibility standpoint favorable to the verdict * * *", to determine whether it was "adequate to support

recovery" (*Palmer Coal & Rock Co.* v. *Gulf Oil Company - U.S.*, 524 F.2d 884, at 885). The Court considered certain chosen portions of the evidence to determine whether the jury "could infer" fraudulent misrepresentation, or "could premise such an inference" (Id. at 887).

REASONS FOR GRANTING THE WRIT

The Court Below Is Testing The Legal Sufficiency Of Evidence In Common Law Actions Where Jurisdiction Is Based Upon Diversity, By A Standard Which Would Not Have Been Applied Had The Action Been Filed In State Court, And Is Refusing To Apply State Rules Defining The Sufficiency Of The Evidence To Support Such Cause Of Action.

A decisive determination should be made by this Court as to whether a Federal Court in a diversity case may determine the legal sufficiency of the evidence to support a claim resting upon the common law of a state, solely by reference to its own rules or standards, and without regard to the legal standard which would have been applied to the evidence in an action in a state court. This Court, interpreting the "Rules of Decision Act" (28 U.S.C. § 1652), has held that a Federal Court, in a diversity case, may not, as to non-federal matters, disregard state law which affects the substantive rights of the parties (*Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1189 (1938)). The initial test formulated by this Court for determining whether federal or state law controls a question before the Court, was whether it would significantly affect the result of the litigation for a federal court to disregard a law of a state that would be controlling in an action upon the same claim by the same parties in a state court (*Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109, 65

S.Ct. 1464, 89 L.Ed. 2079, 2086 (1945)). Later, in *Hanna* v. *Plummer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), this Court added the further requirement that the choice between state and federal law also be made with reference to the essential policies underlying *Erie*.

Within this framework, this Court has had occasion to consider and resolve many controversies as to whether federal or state law controlled a particular matter in issue before a federal court, and has ruled that a prior state decision as to the sufficiency of the evidence on the same facts between the same parties is binding in federal court (*Stoner* v. *New York Life Ins. Co.*, 311 U.S. 464, 468, 61 S.Ct. 336, 85 L.Ed. 284, 287 (1940)). However, the question whether a state "standard" of legal sufficiency of the evidence is binding in federal court is unresolved (*Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 445, 79 S.Ct. 921, 3 L.Ed.2d 935, 941 (1959); *Byrd* v. *Blue Ridge Rural Elect. Coop.*, 356 U.S. 525, 536-537, 78 S.Ct. 893, 2 L.Ed.2d 953, 962 (1958)).

In *Byrd*, the Court determined that the matter of allocating functions between judge and jury in a federal court was a matter controlled by federal law, observing that the 7th Amendment assigns "the decisions of disputed questions of fact to the jury" (356 U.S. at 537, 78 S.Ct. at 901, 2 L.Ed.2d at 962). The preliminary question, however, whether the evidence in a particular case is sufficient to support a cause of action and present a jury question is entirely one of law for the Court. The rules and standard to be applied in making the determination are the same in the trial court and on appeal (*U.S. for Use and Benefit of Weyerhaeuser Co.* v. *Bucon Constr. Co.*, 430 F.2d 420, 423 (5 Cir. 1970); *O'Day* v. *Chicago River & I. R. Co.*, 216 F.2d 79, 82 (7 Cir. 1954); *Roche* v. *New Hampshire Nat. Bank*, 192 F.2d 203, 205 (1 Cir. 1951); *Calloway*

v. *Central Charge Serv.*, 440 F.2d 287, 289 fn. 2 (D.C. Cir. 1971); *Alman Bros. Farms & Feed Mill, Inc.* v. *Diamond Lab., Inc.*, 437 F.2d 1295, 1298 (5 Cir. 1971); *Schneider* v. *Chrysler Motors Corp.*, 401 F.2d 549, 555 (8 Cir. 1968); *Swearngin* v. *Sears Roebuck & Co.*, 376 F.2d 637, 639 (10 Cir. 1967); *O'Connor* v. *Pennsylvania R. Co.*, 308 F.2d 911, 914 (2 Cir. 1962)). The Court's decision on the question, of course, also determines whether a jury trial will proceed in the particular case.

As to this preliminary question of law, the lower courts continue in wide disagreement as to whether state or federal rules regarding sufficiency of the evidence are to be applied. Courts of the Second, Third, Sixth, Seventh, Eighth and Ninth Circuits look to the state standard of proof (E.g., *Calvert* v. *Katy Taxi, Inc.*, 413 F.2d 841, 846 (2 Cir. 1969); *Waldron* v. *Aetna Casualty & Surety Co., Inc.*, 141 F.2d 230, 234 (3 Cir. 1944); *Stopper* v. *Manhattan Life Ins. Co.*, 241 F.2d 465 (7 Cir. 1957), cert. den. 355 U.S. 815, 78 S.Ct. 17, 2 L.Ed.2d 32; *McCabe* v. *Bagby*, 186 F.2d 546, 549-550 (6 Cir. 1951); *Moskowitz* v. *Peariso*, 458 F.2d 240, 244 (6 Cir. 1972); *Clay County Cotton Co.* v. *Home Life Insurance Co.*, 113 F.2d 856, 861 (8 Cir. 1940); *Hardware Mutual Ins. Co. of Minnesota* v. *Jacob Hieb, Inc.*, 146 F.2d 447, 452 (8 Cir. 1945); *Illinois State Trust Co.* v. *Terminal R. Assn. of St. Louis*, 440 F.2d 497, 500 (7 Cir. 1971), cert. denied 404 U.S. 855, 92 S.Ct. 100, 30 L.Ed.2d 96; *Asheim* v. *Pigeon Hole Parking, Inc.*, 283 F.2d 288, 290, 292 (9 Cir. 1960)). Others, including the Tenth Circuit, consistently disregard state rules relating to the sufficiency of the evidence (*Smith* v. *Mill Creek Court, Inc.*, 457 F.2d 589, 590 (10 Cir. 1972); *Mr. Steak, Inc.* v. *River City Steak, Inc.*, 460 F.2d 666, 668 (10 Cir. 1972); *Oldenburg* v. *Clark*, 489 F.2d 839, 841 (10 Cir. 1974); *Palmer* v. *Ford Motor Co.*, 498 F.2d 952, 953 (10 Cir. 1974); *Chicago, R. I. & Pac. Railway Co.* v. *Howell*, 401 F.2d 752, 754 (10 Cir. 1968); (and cases cited therein)). The Court of Appeals, furthermore, will not reverse the trial court's determination of the sufficiency of the evidence unless it is "clearly wrong" (Ibid.).

Under the long-standing law of Kansas, a presumption of good faith and fair dealing in all transactions is observed (*Long Bros.* v. *West & Co.*, 31 Kan. 298, 301, 1 Pac. 545, 547 (1884); *In re Estate of Shirk*, 194 Kan. 424, 429, 399 P.2d 850, 855 (1965)). An effect of the presumption is to impose upon one claiming fraud, a higher, more stringent burden of proof.

Kansas courts thus require evidence of a "clear and convincing" degree in order to overcome the presumption. The phrase "clear and convincing proof" is used "where for one reason or another it is felt that a 'mere preponderance' of the evidence is insufficient" (*Fox* v. *Wilson*, 211 Kan. 563, 578, 507 P.2d 252, 264 (1973); and see *In re Estate of Shirk*, 194 Kan. 424, 428, 399 P.2d 850, 854 (1965)). Under Kansas law, the presumption never disappears:

> "[K.S.A.] 60-416. *Burden of proof not relaxed as to some presumptions.* A presumption, which by a rule of law may be overcome only by proof beyond a reasonable doubt, *or by clear and convincing evidence*, shall not be affected by sections 60-414 or 60-415 *and the burden of proof to overcome it continues on the party against whom the presumption operates.* [L. 1963, ch. 303, 60-416; Jan. 1, 1964.]" (Emphasis added).

As to the effect of this presumption upon the burden of proof, a federal court is required to give full effect to the state rule (*Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 446, 79 S.Ct. 921, 3 L.Ed.2d 935, 942 (1959); *Palmer*

v. *Hoffman*, 318 U.S. 109, 117, 63 S.Ct. 477, 87 L.Ed. 645, 651 (1942); *Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 212, 84 L.Ed. 196, 198 (1939)). This Court has ruled:

> "Under the Erie rule, presumptions (and their effects) and the burden of proof are 'substantive' * * *." (*Dick* v. *New York Life Ins. Co.*, supra, at 446, 79 S.Ct. at 927, 3 L.Ed.2d at 942).

Where the presumption obtains, it also has the effect of fixing a rule of law as to the sufficiency of the evidence to support a claim of fraud, to be applied by the Court. The presumption derives from a policy of Kansas courts of protecting persons from unfounded claims of fraud and of carefully scrutinizing the evidence offered to support claims of such nature. The rule will be applied by the Court both at trial and on appeal (*In re Estate of Shirk*, 194 Kan. 671, 672, 401 P.2d 279, 280-289 (1965); *Fox* v. *Wilson*, supra, at 579-580, 507 P.2d at 265 (1973)). The meaning of the rule as defined by the Kansas Supreme Court is that the claimant must only have "substantial" persuasive evidence, or evidence of sufficient *"quantity"*, he must also have evidence of the requisite *"quality"* (*Fox* v. *Wilson*, supra, at 579, 507 P.2d at 265). His evidence must be "clear". Under the test, evidence is "clear" only if it is "not ambiguous, equivocal, or contradictory" (*Jackman* v. *Development Co.*, 106 Kan. 59, 65, 187 Pac. 258, 261 (1920); *In re Estate of Shirk*, supra; *Fox* v. *Wilson*, supra). Evidence which is unclear, equivocal or ambiguous as to meaning does not meet the test. Evidence offered which raises conflicting inferences, one of which is consistent with honesty and good faith is insufficient as a matter of law (Id.; *Sipes* v. *Crum*, 204 Kan. 591, 598, 464 P.2d 1, 6-7 (1970); *Minnesota Avenue, Inc.* v. *Automatic Packagers, Inc.*, 211 Kan. 461, 466, 507 P.2d 268, 272 (1973); *Reeder* v. *Guaranteed Foods, Inc.*, 194 Kan. 386, 393-396, 399 P.2d 822, 829-830 (1965)).

The Court below disregarded this rule that plaintiff's evidence must be of the requisite *quality* and did not consider the question whether plaintiff's evidence was unclear, equivocal or ambiguous. It determined only that plaintiff's evidence might support inferences favorable to plaintiff. Under the stated Kansas Rule, though evidence may support inferences favorable to plaintiff, if it is also consistent with the presumption of honesty and fair dealing, it is legally insufficient to go to the jury.

The testimony of Mr. Card regarding Mr. Miner's statements, quoted by the lower court in its opinion was offered by plaintiff as its proof of a misrepresentation. The disputed portion of his testimony was that Miner told him "could even be that they would just take us out of business or buy us out of business, if this was our desire, provided that they took the field, if they took the field." (*Palmer Coal & Rock* v. *Gulf Oil Company - U.S.*, supra, at 886). Plaintiff's case rested upon a claim of "promissory misrepresentation" or of falsely stating an intention to purchase plaintiff's mine. This testimony of plaintiff's principal witness indicates a representation of the *possibility* of a future purchase, not a *promise* or definite undertaking to purchase. It implies possible future negotiations for the purchase, not a commitment to purchase upon unknown or uncertain terms. It is by no means clear and unequivocal evidence of a promise or a definite intent to purchase. Nowhere in the testimony quoted by the lower court, or elsewhere in the record is there any clear, unequivocal, or unambiguous evidence of a misrepresentation of a material fact. Nowhere in the record is there evidence inconsistent either with the presumption of good faith, or with the equal tendency of

plaintiff's evidence to prove that defendant in fact did keep the promises of Mr. Miner to protect plaintiff's coal reserves and to enter into future negotiations regarding a possible purchase.

Furthermore, according to plaintiff's witness, Mr. Card, the possibility of a purchase depended upon whether plaintiff "took the field". In order to show a misrepresentation thus, plaintiff had to bring forth evidence tending to show that the condition precedent had clearly occurred, and that defendant "took the field". Without such evidence, plaintiff could neither prove a false promise or promissory misrepresentation. Again, nowhere in the record is there clear or unambiguous evidence that defendant "took the field". The testimony of plaintiff's own witness, Card, established that the optioning of land did not amount to "taking the field".

The lower court itself observed that "the testimony is, of course, extensive, conflicting in part, and, in some instances, somewhat contradictory" (*Palmer Coal & Rock Co.* v. *Gulf Oil Company* — *U.S.*, supra, at 885). Had the state standard as to the sufficiency of plaintiff's evidence in a fraud case been applied, and had the Court considered whether the evidence was clear, unambiguous and unequivocal, so as to negative the presumption of honesty and fair dealing, the Court's analysis and conclusion would have been otherwise. Plaintiff's evidence, being ambiguous and wholly consistent with the defendant's presumed good faith and fair dealing, would have been insufficient as a matter of law, had the case been brought to a Kansas court.

The standard for determining whether evidence is sufficient to show the elements or facts constituting common law fraud, is a rule by which the primary rights and liabilities of the parties in a particular case are determined.

Facts exist in law in a particular case only by the evidence which supports them. Where state law not only defines the elements constituting common law fraud, but also fixes the standard by which a court is to determine whether the necessary facts have been sufficiently evidenced, *Erie* dictates that a federal court should look to state law controlling such determination. As this Court stated in *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, at 533, 93 L.Ed. 1520 at 1523 (1946):

> "Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court * * *."

In this case, the lower court has applied its own standards in testing the sufficiency of plaintiff's evidence to establish common law fraud, a cause of action derived solely from state law, and has disregarded and ignored the standard which would have been applied in a state court. The result is the creation of intrastate disuniformity and the encouragement of forum shopping, which *Erie* was intended to preclude.

This Court, in *Erie*, said:

> "Swift v. Tyson introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general rule' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uni-

formity in the administration of the law of the state." (*Erie R. Co.* v. *Tompkins*, supra, at 74-75, 82 L.Ed. at 1192).

Disregard of applicable state requirements as to sufficiency of the evidence will make the rights of parties vary according to whether suit is brought in state or federal court and brings into being an unequal administration of justice. If a suit is brought in a Kansas state court, clear and unambiguous evidence is necessary to overcome the presumption of good faith and fair dealing. If brought in a federal court, the court will only search plaintiff's evidence for an inference of fraud. As in the case at bar, in Federal Court, the degree of proof necessary to make out a cause of action is redefined and plaintiff's burden substantially lightened. The outcome of a lawsuit within a state, if conditions of diversity jurisdiction are present, will depend upon the choice of a federal or state forum.

Intrastate forum shopping, with a preference for the liberal standards of federal court, is a certain result. This result is particularly obvious with reference to claims of fraud. There is a growing tendency of lawyers nowadays to insert allegations of fraud in every lawsuit filed, no matter how slight the justification therefor. In Kansas, allegations of fraud carry serious implications and entitle a successful claimant to punitive damages. The presumption of honesty and fair play and the requirement of a higher degree of proof are the consequences of a basic, long-standing, policy of Kansas courts. To disregard such state policy and requirement as to the claimant's evidence, in favor of a liberal federal standard, is not only to invite doubtful claims of fraud, but also to invite litigation thereof in federal court in every case where diversity jurisdiction lies. Such result is a direct and fundamental

retreat from the teaching of *Erie* that "it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in the federal court" (*Hanna* v. *Plummer*, supra, at 467, 85 S.Ct. at 1141, 14 L.Ed.2d at 14).

CONCLUSION

Accordingly, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Tenth Circuit, and, after briefing and argument, the judgment should be reversed.

Respectfully submitted,

LEONARD O. THOMAS
J. D. LYSAUGHT
DAVID K. FROMME
Of the Firm of
WEEKS, THOMAS, LYSAUGHT, BINGHAM & MUSTAIN, CHARTERED
Home State Bank Building
Minnesota Avenue at Fifth
Kansas City, Kansas 66101

and

DONALD E. WILLSON
1720 South Bellaire Street
Denver, Colorado 80222
Attorneys for Petitioners

I certify that on this 4th day of February, 1976, a true and correct copy of the above and foregoing Petition for a Writ of Certiorari was placed in the United States mail, postage prepaid, to Short & Short, 4 Louderback Building, Fort Scott, Kansas 66701, and to Schnider, Shamberg & May, Chartered, 7th Floor, Huron Building, Kansas City, Kansas 66101, attorneys for respondent. All parties required to be served have been served.

DAVID K. FROMME
Attorney for Petitioners

APPENDIX

NOVEMBER TERM—JANUARY 8, 1976

Before The Honorable David T. Lewis, Chief Judge, The Honorable Robert H. McWilliams and The Honorable William E. Doyle, Circuit Judges

No. 74-1599

(D.C. No. KC-3263)

PALMER COAL & ROCK COMPANY, INC.,
a corporation,
Plaintiff-Appellee,

vs.

GULF OIL COMPANY - U.S., a corporation, a/k/a GULF OIL CORPORATION, a corporation, and PITTSBURG & MIDWAY COAL AND MINING COMPANY,
a corporation,
Defendants-Appellants.

This matter comes on for consideration of appellant's motion to recall the mandate in the captioned cause and stay the reissuance of it pending petition for writ of certiorari. The Court has also considered the response of the appellee.

Upon consideration whereof, it is ORDERED that the mandate of this Court issued December 29, 1975, is hereby recalled.

It is further ORDERED that the mandate shall be stayed until February 7, 1976, pending certiorari and that if on or before that date there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellant has

timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

The Clerk shall forward a certified copy of this Order to the United States District Court for the District of Kansas, and to the parties of record.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

NOVEMBER TERM—DECEMBER 19, 1975

Before The Honorable David T. Lewis, Chief Judge, The Honorable Delmas C. Hill, The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams, The Honorable James E. Barrett, and The Honorable William E. Doyle, Circuit Judges

No. 74-1599

PALMER COAL & ROCK COMPANY, INC.,
a corporation,
Plaintiff-Appellee,

vs.

GULF OIL COMPANY - U.S., a corporation, a/k/a GULF OIL CORPORATION, a corporation, and PITTSBURG & MIDWAY COAL AND MINING COMPANY,
a corporation,
Defendants-Appellants.

This matter comes on for consideration of the motion by appellants for an extension of time to file a petition for rehearing, and the petition for rehearing with suggestion for rehearing en banc which was submitted by the appellants in the captioned cause.

Upon consideration whereof, it is the order of the Court as follows:

1. The appellant's motion for an extension of time to file a petition for rehearing is granted. The petition is ordered filed as of December 1, 1975, the date of its receipt.

2. The Petition for rehearing is denied by Circuit Judges Lewis, McWilliams, and Doyle to whom the case was submitted.

3. The Petition for Rehearing having been denied by the original panel to whom the case was submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on Rehearing En Banc, Rule 35, Federal Rules of Appellate Procedure, the Suggestion for Rehearing En Banc is denied.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1599

(KC-3263)

PALMER COAL & ROCK COMPANY, a Corporation,
Plaintiff-Appellee,

v.

GULF OIL COMPANY - U.S., a Corporation aka GULF OIL CORPORATION, a Corporation, and THE PITTSBURG & MIDWAY COAL MINING CO., a Corporation,
Defendants-Appellants.

Appeal From the United States District Court
for the District of Kansas

(Filed November 3, 1975)

Leonard O. Thomas of Weeks, Thomas, Lysaught, Bingham & Mustain, Kansas City, Kansas (David K. Fromme, of the same firm, on the brief) for Appellants.

John E. Shamberg of Schnider, Shamberg & May, Shawnee Mission, Kansas (Charles F. Schnider, of the same firm, on the brief); Forrest E. Short of Short & Short, Fort Scott, Kansas (Joel B. Short, of the same firm, on the brief) for Appellee.

Before LEWIS, Chief Judge; McWILLIAMS and DOYLE, Circuit Judges.

LEWIS, Chief Judge.

Defendant Gulf Oil Company (Gulf) and its subsidiary, Pittsburg & Midway Coal Mining Company (P & M), appeal from judgments entered in the district court for the District of Kansas following jury verdicts amounting to $500,000 compensatory and $1,500,000 punitive damages awarded to plaintiff Palmer Coal & Rock Company (Palmer Coal). The trial court reduced the actual damages to $466,830.50 after determining that the jury verdict was supported by the evidence only to that extent. The verdicts resulted from the jury's favorable consideration of plaintiff's claims of damage resulting from flagrant and fraudulent misrepresentations made by defendants during the course of acquisition of coal properties in Kansas and Missouri.

The trial court submitted the issues to the jury under instructions specifically setting out the elements allowing recovery for actionable fraud under Kansas law and to which no objections were taken. Although defendants' claims of trial error are separately stated and argued they are largely directed at the sufficiency of the evidence to support any recovery under the court's instructions.[1]

---

[1] 1. That false or untrue representations were made as a statement of existing and material fact;

2. That the representations were known to be false or untrue by the party making them, or were recklessly made without knowledge of their truth or falsity;

3. That the representations were made with the intent to deceive and for the purpose of inducing the plaintiff to act upon them;

4. That plaintiff relied and acted upon the representations made; and

5. That plaintiff sustained damage as a result of relying upon the representations.

You are instructed that a representation is material when it relates to some matter that is so substantial and important as to influence the party to whom it is made.

Since our review of the record we are fully satisfied, as was the trial court, that the evidence is completely adequate to support recovery. The testimony is, of course, extensive, conflicting in part, and, in some instances, somewhat contradictory. However, viewing the evidence from a credibility standpoint favorable to the verdict, the agreements, actions, and motives of the parties can be summarized and narrated.

During the mid-1960's Palmer Coal was organized and began operating a relatively small leasehold custom coal mining operation in Kansas. The operation proved moderately successful and sufficiently so to allow Palmer Coal to borrow a total of $225,000 from the Small Business Administration for expansion purposes, the loan being arranged through a Kansas bank.

The expanded Palmer mine was still prospering in 1968 when its owners became alarmed by information that Gulf interests were doing extensive drilling in large areas of Kansas and Missouri and upon land near and even adjacent to the Palmer leasehold. Recognizing that Gulf's activities and intentions were critical to the long term Palmer interests, particularly because long term operations required the acquisition of additional coal resources for Palmer, Mr. Harold Card, a vice president of Palmer, called Mr. James Miner, vice president of P & M in charge of land acquisition, and arranged a meeting.

At this meeting Miner assured Card that the Gulf interests had no plans or intentions of harming the Palmer

---

Misrepresentations in order to constitute actionable fraud, must relate to a material present or pre-existing fact. Ordinarily, fraud cannot be predicated on unfulfilled promises or statements concerning future events. However, a promise to do something in the future, when the other elements of fraud are present, constitutes actionable fraud if at the time of making the statement the promissor has no intention of performing the promise made.

operations and to the contrary that the two companies could and should cooperate to their mutual benefit. Card testified as to Miner's representations in detail:

> He [Miner] told me that we could be of great help to them in the area by being familiar with it, No. 1, knowing the people that were involved around the area, we were acquainted with them, most of the people in this small area, that we could be an asset to Gulf in acquiring these reserves and *if we would cooperate, he would set aside or carve out whatever coal was needed by us if we wanted to continue and stay in the coal business.*
>
> At that time I told him I thought we would like to stay in the coal business and by him protecting us on future reserves, I thought it would be a great deal.
>
> He said if we weren't quite satisfied with the situation, *could even be that they would just take us out of business or buy us out of business, if this was our desire, provided that they took the field, if they bought the field. So I told him it sounded like a good agreement* but I would appreciate it if he would go over to my banker with me. I said, "This being a small area, the rumor gets out about Gulf, it will scare the banker and we owe him the money. Would you go over and tell him what you just told me?" He said, "Harold, I would even put it in writing but I would rather not. It would constitute more problems and I just would not rather." I said, "I have no reason not to trust you, sir, but if you will go to the bank with me so my banker won't become upset, that's fine." So we finished our coffee, went directly to the bank from there. (Emphasis added).

The testimony of the banker, Mr. Floyd Dotson, completely corroborated Card's version of Miner's representations. Dotson testified that Miner represented

> his company would be willing to bail them [Palmer] out by purchasing their property or carve them out this land that would give them 8 to 10 years of operation in that area.

Subsequently, the owners of Palmer Coal made substantial efforts to help P & M obtain acreage. Card toured and discussed the area with Miner and other officers of defendants. Local landowners were encouraged to talk to defendants representatives and were visited by Card with defendants' land agents. Lists of landowners were also furnished. Card talked to local banks, the radio station manager, merchants, and others. Equipment was stored at the Palmer mine and P & M's employees made use of those facilities. Card also accompanied and assisted in P & M's drillings. Defendants were allowed to study plaintiff's mine and its coal vein was measured and correlated with the lay of the land. Knowledge and information concerning coal-bearing lands, developed in part from some 300 core-drilling tests, was also conveyed. Prior to enlisting the help of the Palmer mine owners defendants had obtained but four options to purchase land; in the subsequent four months 60 option agreements with property owners were reached covering 13,650 acres of coal-bearing land in the vicinity of the Palmer mine.

During this period output at the Palmer mine slowed because of Card's frequent absence on behalf of defendants and as a result of employees obtaining other employment because of a fear that P & M would shut down the Palmer mine. Palmer Coal failed to make a July payment and following payments on its S.B.A. insured loan from Dotson's bank. In December as the S.B.A. began pressing

plaintiff to pay the loan it was told of the alleged agreement between plaintiff and defendants and a meeting was arranged. In attendance were Palmer, Card, Dotson, Miner and P & M's attorney, Borders, together with officers of the S.B.A. Card testified that he asked Jim Miner to "live up to your part of the agreement." Miner responded, "Well, gosh, we couldn't buy you out anyway, we would be violating the antitrust or the antitrust regulation." Borders silenced Miner but at some later point Miner stated that P & M had a "moral obligation" to which Card replied:

> This is not what you told me at the bank, this is not what you have been telling me for the past five months. What in the hell do you consider a moral obligation . . . .

Miner responded saying he wasn't aware that they wanted to sell out. Card then said, "Well, I am telling you now, I do." Miner then asked the price to which Card replied:

> Jim, I will take a two years possibly three years of hard work, throw it down the drain, you just give us a check here for three hundred and seventy-five thousand dollars. I can pay S.B.A. off, I will take my bath and get the hell out of here.

Borders then terminated that dialogue and an agreement was reached to submit the financial reports of Palmer Coal to P & M to enable them to consider the purchase. After the reports were submitted P & M refused any purchase.

The lessors of the land on which the Palmer mine operated testified that during the same months that Palmer Coal was actively assisting defendants, those same defendants attempted to purchase the leasehold right out from under the Palmer mine.

After P & M's refusal to recognize any obligation to Palmer Coal this company's mortgage was foreclosed and its entire investment was lost.

As we have earlier indicated, we conclude that plaintiff made a case and, indeed, a strong case. Falsity, inducement, reliance and damage are manifest and the jury could well infer that P & M at no time intended to keep its promises. Miner's avoidance of any writing and the somewhat suppressed concern of P & M relating to possible antitrust difficulties of a buy-out were present at all times during the critical period and could premise such an inference.

Defendants further seek reversal of the case on two issues pertaining to damages. First, the contention is made that the trial court, having determined that the jury award of $500,000 was not supported by the evidence, was powerless to do anything but grant a new trial. We find no support for this argument when the reduction, as here, was made with the consent of the plaintiff, without objection by the defendants, and was made by computations supported by the evidence. Second, defendants assert that the punitive damage award, through amount alone, shows a premise of bias and prejudice. The trial court indicated it was not shocked by the amount nor is this court. Palmer Coal was treated very shabbily by the Gulf interests (assets well over nine billion dollars) and the purpose of punitive damages is to make such conduct unprofitable at least.

Finally, we hold that the trial court made no prejudicial error in the admission of evidence. Defendants objected to the admission of three questions contained in a deposition of Mr. Miner claiming that the questions corrupted the context of Miner's deposition testimony and also that plaintiff had not shown the unavailability of

the witness. In regard to the latter objection the court inquired:

> Mr. Willson: For the record, Your Honor, I object to the admission of only three questions out of a deposition that contained—appears here over six or seven hundred—at least six hundred fifty-four questions, as being taken out of context. There has been no showing that Mr. Miner was not available to them to come into court and testify, no effort has been made to have him come in and testify to this. There is no proper foundation.
>
> The Court: You don't have to show unavailability on an official of a corporation.
>
> Mr. Willson: He is not an official of a corporation, Your Honor, he is retired.
>
> The Court: Are you disputing he is a vice-president or was at the time?
>
> Mr. Willson: He was at the time. He is no longer with the company.
>
> The Court: Your objection is overruled and you may read them.

Apparently Miner was not, in fact, a corporate officer at the time the deposition was *taken* but the trial court had a right to assume that counsel's answer was given in response to the requirements of Fed. R. Civ. P. 32(a)(2) and that the answer referred to that time. The error, in any event, was caused by counsel's lack of specificity. Nor can note be taken at this time of a claim that the deposition was used out of context when, as here, no offer of other portions of the deposition was made by defendants and it is inherently doubtful that any such matter could be considered as prejudicial when, as here, the witness testified, personally, at length later in the trial.

Defendants also assert that the court erred in allowing evidence to be received as to a subsequent sale of property which included some assets of Palmer Coal. Although the relevancy of this evidence is perhaps questionable its impact could not be prejudicial as against the record as a whole.

The judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION

No. KC-3263

PALMER COAL & ROCK COMPANY,
Plaintiff,

v.

GULF OIL COMPANY-U.S., a corporation, a/k/a GULF OIL CORPORATION, a corporation and THE PITTSBURG & MIDWAY COAL MINING CO., a corporation,
Defendants.

MEMORANDUM AND ORDER

(Filed June 11, 1974)

This is an action based on fraud which resulted in a jury verdict for plaintiff in the amount of $500,000 compensatory damages, and $1,500,000 punitive damages. The defendants have filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. Comprehensive briefs have been filed by the respective parties. Oral argument was heard by the court on May 30, 1974, after which the matter was taken under advisement.

After carefully reviewing the briefs of the parties and being fully advised in the premises, the court finds that the motion (except as to the amount of the judgment for compensatory damages) should be overruled.

Several of the major points urged by defendants in support of their alternative motion will be mentioned briefly.

In determining the legal sufficiency of the evidence, the court has applied the tests set forth in *Fox* v. *Wilson*, 211 Kan. 563, 507 P.2d 252, and finds that defendants' motions for directed verdict were properly denied at trial, and that the verdict rendered is supported by clear and convincing evidence.

Defendants' argument that there was in fact no representation made must be rejected. The case was presented by plaintiff on the theory that defendants' agent (Minor) made the representation that, "if the plaintiff would cooperate and assist the defendants in acquiring coal bearing lands in the vicinity of the plaintiff's mine, by acquainting the defendants and their agents with the farmer-owners of the lands, assisting them to secure options to purchase said lands, etc., then in return, the defendants would either carve out reserve acreage for the plaintiff or would assure that the plaintiff suffered no monetary losses by buying out the plaintiff for a sum equal to plaintiff's liabilities and investments, at plaintiff's option." (Plaintiff's Brief, p. 19) Further, there was no "condition" attached to the representation, as urged by defendants. There was also ample evidence from which the jury could find there was an intent to deceive on the part of defendants' agent at the time the representation was made. The jury was fully instructed, without objection, on the elements of fraud under Kansas law in accordance with PIK 14.40 and 14.41.

With respect to damages, the jury obviously found that the defendants had agreed at the plaintiff's option to purchase the plaintiff's mining operation for a sum sufficient to reimburse the stockholders for their investments in said mining operation, and to pay all of plaintiff's outstanding liabilities and obligations. If it has not already done so, Kansas would recognize the majority view that permits plaintiffs in fraud cases to recover not only their direct "out-of-pocket" expenses, but their "benefit of bargain," all as reflected by the court's instruction No. 9, which was not objected to by the defendants. The damages sustained by plaintiff are those flowing from the false representations made by defendants' agent as above set forth, and upon which the plaintiff relied. The jury's verdict of $500,000 actual damages is supported by evidence only to the extent of $466,831.50, and accordingly, must be and is modified to that extent.

The other grounds urged by defendants in support of their motion for judgment notwithstanding the verdict, are found to be without merit for the reasons stated at the hearing on the motion.

The arguments advanced by defendants in their alternative motion for a new trial, are not persuasive for the reasons well stated in plaintiff's brief.

The fact that the verdict of actual damages must be reduced to $466,831.50, does not in any way require that the verdict for punitive damages be disturbed. In view of the evidence, the punitive damage award, while large, does not reflect that the jury acted out of sympathy, bias or prejudice, nor does it in any way shock the conscience of this court.

The jury's verdict to the extent of $466,831.50, for actual or compensatory damages, and $1,500,000 punitive

damages, is approved. Defendants' motion for judgment notwithstanding the verdict, or in the alternative for a new trial, is overruled. Plaintiff's counsel will prepare and submit a journal entry reflecting the court's ruling in this memorandum.

IT IS SO ORDERED.

Dated this 11th day of June, 1974, at Kansas City, Kansas.

/s/ Earl E. O'Connor
United States District Judge

In The

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
MAR 3 1976
MICHAEL RODAK, JR., CLERK

No. 75-1112

GULF OIL COMPANY—U.S., a Corporation, a/k/a GULF OIL CORPORATION, a Corporation, and THE PITTSBURG & MIDWAY COAL MINING CO., a Corporation,

Petitioners,

vs.

PALMER COAL & ROCK COMPANY, a Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CHARLES S. SCHNIDER
JOHN E. SHAMBERG
of the Firm of
SCHNIDER, SHAMBERG & MAY
4210 Johnson Drive
205A Fairway Office Building
Shawnee Mission, Kansas 66205

and

FORREST E. SHORT
JOEL BRADLEY SHORT
CHARLES GENTRY
of the Firm of
SHORT AND SHORT
4 Louderback Building
Fort Scott, Kansas 66701

Attorneys for Respondent

E. L. Mendenhall, Inc., 926 Cherry St., Kansas City, Mo. 64106, 816-421-3030

TABLE OF CONTENTS

Summary of Case and Post-Trial Events 1

Reasons for Denial of the Writ—

I. Evidence presented at trial, but omitted from petitioners' request for a writ of certiorari, fully satisfied the "clear and convincing" requirement of *Fox* v. *Wilson* 9

II. The District Court and the Court of Appeals, in conformity to the *Erie* Doctrine, correctly applied Kansas law in testing the sufficiency of the evidence presented at trial 13

Conclusion 18

Certification 19

Table of Authorities

Berenyi v. *District Director, Immigration and Naturalization Service*, 385 US 630 (1967) 17

Besser Mfg. Co. v. *United States*, 343 US 444 (1952) 17

Connett Lumber Co. v. *New Amsterdam Casualty Co.*, 236 F. 2d 117 (8th Cir. 1956) 17

Erie R. Co. v. *Tompkins*, 304 US 64 (1938) 9, 13

Federal Trade Commission v. *Standard Oil Co.*, 355 US 396 (1958) 17

Fox v. *Wilson*, 211 Kan. 563, 507 P. 2d 252 (1973) 8, 12, 13, 14

Graham v. *Brotherhood of Local Firemen & Enginemen*, 338 US 232 (1949) 17

Graver Tank & Mfg. Co., Inc., et al. v. *Linde Air Products Co.*, 336 US 271 (1949) 17

Guaranty Trust Co. v. *York*, 326 US 99 (1945) 13

Hanna v. *Plummer*, 380 US 460 (1965) 13

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 US 481 (1968) 17
Huddleston v. *Dwyer*, 322 US 232 (1944) 17
Jones v. *United States*, 357 US 493 (1958) 17
Kann v. *United States*, 323 US 88 (1944) 17
Layne & Bowler Corp. v. *Western Well Works, Inc.*, 261 US 387 (1923) 17
Mercantile Trust Co. v. *Hensey*, 205 US 298 (1907) 17
NLRB v. *Pittsburgh S.S. Co.*, 340 US 498 (1951) 17
Neil, Warden v. *Biggers*, 409 US 188 (1972) 17-18
Rice v. *Sioux City Memorial Park Cemetery, Inc.*, 349 US 70 (1955) 17
United States v. *Reliable Transfer Co.*, 421 US 397 (1975) 17
United States v. *Wilkinson*, 12 How. 246 (1849) ... 17

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1112

GULF OIL COMPANY—U.S., a Corporation, a/k/a GULF OIL CORPORATION, a Corporation, and THE PITTSBURG & MIDWAY COAL MINING CO., a Corporation,
Petitioners,

vs.

PALMER COAL & ROCK COMPANY, a Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUMMARY OF CASE AND POST-TRIAL EVENTS

Respondent (Plaintiff below) deems the "Statement of the Case" set forth in the Petition incomplete and is therefore constrained pursuant to Rule 40(3) of the Rules of the Supreme Court to present the following summary of the case.

This case arose as an action in the United States District Court for the District of Kansas to recover damages suffered by the plaintiff as a result of reliance upon a fraudulent misrepresentation made by the defendants.

Plaintiff was a small coal mining company incorporated under the laws of Kansas in 1966.

Defendants Gulf Oil Company and one of its wholly owned subsidiaries, The Pittsburg and Midway Coal Mining Company, are both corporations, and both are herein referred to as "Gulf".

In the early part of 1967, plaintiff began coal mining near Fort Scott, Kansas, having purchased mining equipment through loans guaranteed by the Small Business Administration which eventually totaled $225,000.00. During the year 1967 and the first part of 1968, plaintiff's mining operation expanded and production steadily increased (R. 19-20, 25-26, 33-34).

During 1968 Gulf, having decided to acquire additional land for mining coal, sent agents to the Fort Scott, Kansas area to obtain options for purchase of coal land (R. 658).

In April of 1968 plaintiff learned that Gulf's land agents were attempting to obtain an option to buy the coal land immediately adjacent to plaintiff's mine. (R. 39).

Plaintiff had been trying to obtain the same land for itself and was alarmed by Gulf's attempt to purchase the land (R. 39).

Plaintiff's vice-president, Harold Card, contacted James A. Miner, vice-president of Gulf's subsidiary, Pittsburg & Midway Coal Mining Company, who had been given responsibility for securing new coal reserves in the Fort Scott area. Mr. Card demanded to know what Gulf's intentions were and how Gulf's operations might affect the plaintiff (R. 41, 655).

Miner, who was concerned, as it later developed, with antitrust problems, assured Mr. Card that Gulf

had no intention of harming the plaintiff and offered to come to Fort Scott to discuss the threat posed to plaintiff by Gulf's plans to acquire coal lands (R. 41).

Card testified that when he and Miner met at the Downtowner Hotel in Fort Scott he explained to Mr. Miner that the plaintiff was conducting a small mining operation; that it had borrowed heavily to expand it, and had intentions of continued expansion; and that it could not hope to compete with Gulf, which was offering bonus prices for the available coal reserves around plaintiff's mine (R. 45).

Miner stated to Card that it was Gulf's intention to acquire all the coal reserves it could in the area, but that it was not Gulf's intention to harm plaintiff's company. Miner suggested that the plaintiff "could be of great help" to Gulf in acquiring the coal land options which Gulf wanted, due to the fact that plaintiff's officers were local residents, acquainted with (and trusted by) the local landowners (R. 44).

After some discussion of such cooperation, Miner stated that if plaintiff's officers and employees would assist Gulf in obtaining options to purchase coal land, Gulf could set aside sufficient coal reserves to enable plaintiff to continue in the business of mining coal, or, if the plaintiff preferred, Gulf could buy the plaintiff out (R. 45).

Card then asked Miner if he would mind discussing the proposal with Mr. Dotson, the banker through whom the SBA loans had been placed. Miner agreed, stating that he would be willing to "put it in writing" but that a written agreement would "constitute more problems". Card agreed that a repetition of the proposal in front of the banker would suffice and the two men went directly to the bank (R. 45-46).

Card testified that, at the bank, Miner assured the banker and Card that if plaintiff didn't want the coal reserves, then Gulf would buy the plaintiff out, see to it that plaintiff and its stockholders lost no money, and the bank lost no money, stating that the bank and the plaintiff "had nothing to worry about" (R. 47).

The banker, Floyd Dotson, testified that Miner was told of the SBA loan in the amount of $225,000.00 and of the amount of the investments of plaintiff's stockholders. Miner, after repeating Gulf's request for plaintiff's help, stated that his company would be willing, at plaintiff's option, to protect plaintiff from damage by paying plaintiff's liabilities to its creditors and stockholders or giving plaintiff coal land (R. 171, 241).

After meeting at the bank with Mr. Dotson, Card and Miner proceeded to plaintiff's mine, where Miner repeated to plaintiff's president, Bill Palmer and to Margaret E. Palmer, both of whom testified at the trial, the offer made in the meeting at the bank (R. 427-428, 506-507).

The next day, after a meeting of its stockholders, plaintiff advised Miner that the plaintiff would accept Gulf's proposal and assist Gulf in obtaining the coal reserves (R. 49).

Eleven different witnesses testified that during 1968, the plaintiff assisted Gulf in obtaining options for the purchase of 13,560 acres of coal-bearing land in the vicinity of plaintiff's mine. Plaintiff's aid in reliance upon Gulf's offer is not disputed.

In December 1968, defendants took the field by exercising the bulk of their purchase options. Herman E. Knight, one of Gulf's officers, testified that Gulf purchased the fee title to 6,941 acres in the area for a sum in excess of $2,225,000 (R. 738).

Also during the Fall of 1968, the SBA started pressing plaintiff for payment of its loans, and in January of 1969, a meeting was held at the SBA offices in Kansas City, Missouri to discuss Gulf's obligations to plaintiff.

Early in the meeting, when Floyd Dotson said to Miner, "Jim, it is time for you to live up to your agreement in this thing now", Miner's reply was, "Well, gosh *we couldn't buy you out anyway*, we would be violating the anti-trust or the anti-trust regulation" (R. 72, 436) (Emphasis added).

Up to that point in the SBA meeting no one at the meeting had characterized the proposal made by Gulf as a promise to "buy out" the plaintiff. Miner was the first person present to so define the proposal which the plaintiff had accepted.

Card and Palmer, as well as Dyce Bonham and Wallace Buck, officers of the SBA, testified at the trial that, during this meeting, Card accused Miner of failing to perform the promise of financial protection which he had made to the plaintiff on behalf of Gulf in May of 1968 and neither Miner, nor the other two representatives of Gulf who were present at the SBA meeting, denied making the promise (R. 72-73, 343, 397-398, 436).

Plaintiff subordinated its own interests to those of Gulf in reliance upon Gulf's promise of financial protection and, as a result, plaintiff's business operation deteriorated to the point that plaintiff's business was completely destroyed, all of plaintiff's liabilities

($291,136.00) remained unpaid, and all of plaintiff's stockholders' investments ($175,695.50) were lost (Defendant's Ex. N; R. 139-140, 381).

Plaintiff called a total of fifteen witnesses to present testimony on the foregoing chain of events. In response to plaintiff's evidence, the defendants relied primarily upon the testimony of James A. Miner.

In his testimony, Miner admitted receiving the initial telephone call from Card expressing concern as to Gulf's activities around plaintiff's mine (R. 658) and admitted meeting with Card at the Downtowner Hotel in Fort Scott, Kansas. He stated that he "made no deals of any kind" with Mr. Card (R. 699), but later recanted and testified that he *had* made a deal, "right in front of Card" (R. 699).

Admitting that he attended the meeting at the bank with Card and Dotson, Miner denied any discussion of purchasing the plaintiff (R. 666), but later recanted on cross-examination, and admitted making the promise to the plaintiff at said meeting, which he characterized as consisting of assuring the plaintiff of continued land reserves "or any other request they might make" (R. 697). Miner denied repeating his promise (to purchase the plaintiff) in the presence of Bill and Margaret Palmer, directly contradicting their testimony (R. 689).

Miner testified that at no time did the defendants have any intention of buying out the plaintiff (R. 678).

In addition, the jury heard evidence that defendants had made no pretense of performing their promise of May 1968 and had, in fact, refused to so perform (R. 779-780).

The testimony, as pointed out by counsel for both sides in closing arguments, presented clearcut issues of credibility and fact for the jury to determine.

The trial court submitted the issues to the jury under instructions specifically setting out the elements to be proved to establish fraud under Kansas law (A. 5).

The court also instructed the jury that "The law of the State of Kansas requires that to prove fraud it is necessary for the party claiming fraud to prove it by evidence that is clear and convincing; thus, in this case, plaintiff must persuade you of the truth of its claim of fraud by clear and convincing evidence" (R. 814). The court then defined that phrase for the jury as follows:

> To be clear and convincing, evidence should be clear in the sense that it is certain, plain to the understanding, unambiguous and convincing in the sense that it is so reasonable and persuasive as to cause you to believe it (R. 814).

Gulf made no objection to any instruction given to the jury by the trial court, *nor did it request that any additional instructions be given.*

The case was then submitted to the jury which returned a verdict for the plaintiff in the sum of $500,000 actual damages and $1,500,000 punitive damages. The verdict for actual damages was later reduced by the trial court to $466,831.50 upon motion by Gulf.

Thereafter, Gulf filed a motion for judgment notwithstanding the verdict or for a new trial. After

hearing oral arguments on the motion, the trial judge, the Honorable Earl E. O'Conner, denied defendants' motion, *holding that the verdict rendered by the jury was supported by clear and convincing evidence,* specifically citing the Kansas case, *Fox* v. *Wilson,* 211 Kan. 563, 507 P. 2d 252 (1973) (A. 13).

Thereafter, Gulf perfected its appeal to the Tenth Circuit Court of Appeals claiming that the trial court had erred in denying its motions attacking the sufficiency of plaintiff's evidence and in refusing to grant judgment notwithstanding the verdict.

The decision of the Court of Appeals, written by The Honorable David T. Lewis, Chief Judge, affirmed the rulings of the trial court, stating *inter alia,* ". . . we conclude that plaintiff made a case and, indeed, a *strong* case. Falsity, inducement, reliance and damage are *manifest* . . ." (Emphasis added) (A. 10).

The Court of Appeals also stated, in affirming the trial court's rulings, "The trial court submitted the issues to the jury under instructions specifically setting out the elements allowing recovery for actionable fraud *under Kansas law* and to which no objections were taken" (Emphasis added) (A. 5).

The Court of Appeals reviewed the record of the trial, consisting of 825 pages of testimony and then commented, "*We are fully satisfied,* as was the trial court, that the evidence is completely adequate to support recovery . . ." (Emphasis added) (A. 6).

Gulf then filed a Motion for Rehearing, which was denied by the three-judge panel which had heard the oral arguments, and a Request for Hearing En Banc, which was unanimously rejected by the seven

judges comprising the Tenth Circuit Court of Appeals (A. 1).

Gulf then filed its petition for a writ of certiorari before this Honorable Court.

REASONS FOR DENIAL OF THE WRIT

I.

Evidence presented at trial, but omitted from petitioners' request for a writ of certiorari, fully satisfied the "clear and convincing" requirement of Fox v. Wilson.

Petitioners seek to persuade this Court to grant a writ of certiorari by directing the Court's attention to isolated portions of the testimony of one of plaintiff's fifteen witnesses, Harold Card. They state that the *portion* of Card's testimony *set forth in their petition* was "crucial" to plaintiff's case and was offered as the sole proof of the misrepresentation made to the plaintiff by Gulf.

Petitioners then argue that since the *portion* of Card's testimony which they have chosen to include in their petition, did not establish that a definite purchase offer had been made, the "lower courts", as a matter of law, must not have applied the Kansas test (requiring "clear and convincing evidence") and must, therefore, have applied a different test in contravention of the doctrine expressed in *Erie R. Co.* v. *Tompkins,* 304 US 64 (1938), and subsequent cases.

The "lower courts", of course, in reviewing the 825 page transcript of the trial, considered *all* of Mr. Card's testimony as well as the other fourteen witnesses called by the plaintiff, three of whom testified concerning Gulf's promise to the plaintiff.

While plaintiff does not believe it necessary for the United States Supreme Court to conduct yet another review of the evidence (since the jury, the trial judge and the Court of Appeals have already done so, to their collective satisfaction) plaintiff feels constrained by the misleading presentation of the evidence contained in the petition for certiorari, to advise this court of the more significant portions of the evidence which were omitted therein by the petitioner.

In summarizing Mr. Card's testimony, petitioners omitted the testimony of Harold Card concerning the events which transpired *subsequent* to his initial cup of coffee with Gulf's representative, Mr. Miner, at the Downtowner Hotel in May of 1968.

Petitioners omitted the testimony given by Mr. Card that, immediately after the meeting at the Downtowner, he and Mr. Miner went to the bank where Miner was told of the nature and extent of the plaintiff's financial liabilities and also the amount of the investments which had been made by its stockholders (R. 47).

Petitioners omitted the testimony of Floyd Dotson, the banker, which confirmed that Mr. Miner, in the meeting at the bank, made an offer to financially protect the plaintiff and its stockholders and further gave assurances to the plaintiff's banker and Card that "the bank wouldn't lose any money", the stockholders would lose no money and [they] had "nothing to worry about" (R. 171, 241).

Petitioners also omitted testimony that, subsequent to the meeting at the bank, Mr. Miner and Mr. Card went to the plaintiff's mine where they met with Bill and Margaret Palmer, the plaintiff's

president and his wife, and engaged in a further discussion of Miner's offer. It was the testimony of Bill Palmer and Margaret Palmer, that Miner repeated what had now grown into a definite offer of financial protection, stating that, at the plaintiff's option, Gulf would either "carve out" coal reserves for the plaintiff's use in its operation or, if plaintiff preferred, Gulf would financially protect the plaintiff's stockholders by reimbursing them for their investments and see that plaintiff's liabilities were fully satisfied, if plaintiff would cooperate with Gulf. This was the same assurance of financial protection that he had initially suggested at the Downtowner meeting and made as an offer at the meeting with plaintiff's banker (R. 427-428, 506-507).

Petitioners further omitted Mr. Card's testimony that the plaintiff's stockholders and officers held a meeting and the next day informed Miner that the plaintiff had chosen to accept the offer made in front of the banker and at the mine site and would furnish Gulf the requested assistance in obtaining land options in exchange for the assurances which Miner had given to them (R. 49).

Finally, petitioners have omitted testimony of Dyce Bonham and Wallace Buck, as well as Card and Palmer, that at the meeting held by SBA in January 1969, Miner had characterized his offer to plaintiff as a promise to "buy you out" and that neither he nor two other Gulf officers present denied that the promise had been made, when confronted with such accusation (R. 72-73, 343, 397-398, 436).

This additional testimony, omitted from petitioner's request for a writ of certiorari, certainly satisfied the

"clear and convincing" requirement of Kansas law. The trial judge, in ruling on the motions by the petitioners for judgment notwithstanding the verdict, stated his own satisfaction that the evidence was "clear and convincing" and did not, of course, restrict his evaluation of the evidence solely to that portion of Mr. Card's testimony which petitioners have set forth in their request for a writ of certiorari.

Although petitioners assert that there is "no evidence in the record" to establish that Gulf "took the field" [which they contend was a condition precedent to any obligation on their part to financially protect the respondent], petitioners omitted from their petition for a writ of certiorari the evidence given at the trial by Herman E. Knight, an officer of Gulf, that commencing in December, 1968, Gulf purchased the fee title to 6,941 acres of coal-bearing lands in the immediate vicinity of plaintiff's mine (R. 738) and also omitted the testimony by Mr. Miner that Gulf purchased around nine or ten thousand acres in the area for the purpose of mining coal (R. 681).

Petitioners further omitted the testimony of Ira W. Palmer that, by late 1968 "most of the land around the Palmer Coal and Rock Company had been purchased or optioned by Gulf" (R. 307) and the testimony of Bill Palmer who testified that a "field" was in fact "put together" by Gulf with the assistance of the respondent's employees, for the operation of a mine in the immediate area of the plaintiff's operation (R. 445-446).

Respondent submits that the foregoing testimony fully satisfied the requirements expressed in *Fox* v. *Wilson*, supra, and that its omission from petitioners' "Statement of the Case" was highly misleading!

II.

The District Court and the Court of Appeals, in conformity to the Erie Doctrine, correctly applied Kansas law in testing the sufficiency of the evidence presented at trial.

Petitioners further seek to persuade this Court to grant a writ of certiorari by posing the question:

"*Can* a Federal Court in a diversity case for common law fraud disregard the applicable state rule of law requiring a clear and convincing degree of proof and apply a preponderance of the credible evidence rule of degree of proof?"

The rulings of *Erie R. Co.* v. *Tompkins*, 304 US 64 (1938); *Guaranty Trust Co.* v. *York*, 326 US 99 (1945); and *Hanna* v. *Plummer*, 380 US 460 (1965), make the answer to such question, *as phrased*, clearly "No".

But no matter how petitioners *phrase* their question, the point is "*Did* the District Court and the Court of Appeals disregard applicable state law in violation of the *Erie* doctrine in *this* case?". The answer to *that* question is *also* clearly "No"!

Petitioners are simply engaging in a game of semantics.

Both the petitioners and the respondent in the case at bar concur that *Fox* is the applicable Kansas law.

The opinions of the District Court (A. 12) and the Court of Appeals (A. 4) make it abundantly clear that the Kansas law embodied in the case of *Fox* v. *Wilson*, supra, was scrupulously adhered to.

The rhetorical question propounded by petitioners as the sole justification for issuance of a writ of cer-

tiorari does not, therefore, require or merit this Court's deliberation.

In the *Fox* case, the Supreme Court of the State of Kansas held that (1) the burden of proving fraud is by a *preponderance of the evidence,* this is a matter of quantum; (2) *the character of the evidence required is "clear and convincing"*, this is a matter of quality; (3) by "clear and convincing evidence" it is meant that the witnesses shall be found to be credible, and that the facts to which they testify are narrated exactly and in due order; (4) the trial court is presumed to have applied the correct standard in the absence of a showing to the contrary; (5) such a "showing to the contrary" is made if the record discloses *no* evidence which could be characterized as clear and convincing; if there is substantial competent evidence of the requisite quality to uphold the findings they will be sustained; and (6) in making such a determination this court considers only the evidence of the successful party (Emphasis added).

There is nothing in the record to support petitioners' contention that the trial court and the Court of Appeals did not adhere to the rule as set forth in the *Fox* case. On the contrary, the trial court instructed the jury in strict accordance with the *Fox* rule, as follows:

> The burden of proof is upon the plaintiff to prove fraud on the part of P & M as alleged, and that as a direct result thereof it suffered damages . . .
>
> Burden of proof means the burden of persuasion. The law of the State of Kansas requires that to prove fraud it is necessary for the party claiming fraud to prove it by *evidence that is clear and convincing;* thus, in this case, the plaintiff must persuade you of the truth of its claim of fraud against the defendants by *clear and convincing evidence.* In determining whether plaintiff has met this burden you must consider all the evidence, whether produced by the plaintiff or the defendants.
>
> To be *clear and convincing,* evidence should be clear in the sense that it is certain, plain to the understanding, unambiguous and convincing in the sense that it is so reasonable and persuasive as to cause you to believe it (Emphasis added).

The elements required to prove fraud under Kansas law were also set forth in the Court's charge to the jury (A. 5).

After instruction by the trial court in accordance with the law of the State of Kansas, and absent any request for additional instructions or objection by the defendants, the jury deliberated for less than two hours and brought in a verdict for the plaintiff.

That the evidence was *"clear and convincing"* to the trial court was established by the Court's holding in its memorandum and order, filed June 11, 1974 (A. 13) wherein the Court stated:

> In determining the legal sufficiency of the evidence *the court has applied the tests set forth in Fox* v. *Wilson,* 211 Kan. 563, 507 P. 2d 252, *and finds* that the defendants' motions for a directed verdict were properly denied at the trial and *that the verdict rendered is supported by clear and convincing evidence* (Emphasis added).

The trial court went on to say, "The jury was fully instructed without objection on the elements of fraud under Kansas law in accordance with PIK (*Pattern Instructions for Kansas*) §§ 14.40 and 14.41."

Further proof that the trial court, who heard all the evidence, was satisfied as to its clear and convincing

nature, is found in the court's statement: *"In view of the evidence,* the punitive damage award, while large, does not . . . in any way shock the conscience of this court" (Emphasis added).

The Kansas Supreme Court, in establishing the *Fox* doctrine, stated that an allowance by the trial court of exemplary damages would be considered as proof of the trial court's satisfaction with the quality and quantity of the evidence presented.

The United States Court of Appeals applied the Kansas law in its review and affirmation of the order of the lower court, when it observed, in its opinion filed November 3, 1975 (A. 5), "The trial court submitted the issues to the jury under instructions specifically setting out the elements allowing recovery for actionable fraud *under Kansas law* and to which no objections were taken." The Court further stated in its opinion (A. 6), "Since *our* review of the record *we are fully satisfied* as was the trial court *that the evidence is completely adequate to support recovery*" and "As we have earlier indicated we conclude that plaintiff made a case, indeed, a *strong* case. Falsity, inducement, reliance and damage are *manifest* and the jury could well infer that P & M at no time intended to keep its promises" (Emphasis added).

Petitioners have utterly failed to recite any language used by the Court of Appeals which would indicate that any test other than as set forth in *Fox* v. *Wilson* was applied to review the trial court's evaluation of the sufficiency of the evidence.

In the absence of such an affirmative showing, the language used by the Court of Appeals, coupled with the traditional presumption of this Court of the employment of appropriate standards of review by Courts

of Appeals, *United States* v. *Wilkinson,* 12 How. 246 (1849); *Connett Lumber Co.* v. *New Amsterdam Casualty Co.,* 236 F. 2d 117 (8th Cir. 1956); *Mercantile Trust Co.* v. *Hensey,* 205 US 298 (1907); *Huddleston* v. *Dwyer,* 322 US 232 (1944); *Kann* v. *United States,* 323 US 88 (1944); *Graver Tank & Mfg. Co., Inc., et al.* v. *Linde Air Products Co.,* 336 US 271 (1949); *Graham* v. *Brotherhood of Local Firemen & Enginemen,* 338 US 232 (1949); *Besser Mfg. Co.* v. *United States,* 343 US 444 (1952); *Federal Trade Commission* v. *Standard Oil Co.,* 355 US 396 (1958); *Jones* v. *United States,* 357 US 493 (1958); *Berenyi* v. *District Director, Immigration and Naturalization Service,* 385 US 630 (1967); and *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 US 481 (1968), reduces petitioners' unsubstantiated assertion that the Court of Appeals disregarded the *Erie* doctrine to an unwarranted attack upon the intelligence and integrity of the members of the bench of the Tenth Circuit Court of Appeals.

The Supreme Court of the United States has repeatedly ruled that petitions for the issuance of writs of certiorari will not be granted for the purpose of affording disappointed litigants a review of the evidence which has already been examined and found sufficient by both the District Court and the Court of Appeals. *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387 (1923); *Graver Tank & Mfg. Co., Inc., et al.* v. *Linde Air Products Co.,* supra; *Berenyi* v. *District Director,* supra; *NLRB* v. *Pittsburgh S.S. Co.,* 340 US 498 (1951); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 US 70 (1955) and *United States* v. *Reliable Transfer Co.,* 421 US 397 (1975). The purpose of the Court's policy was lucidly set forth by Mr. Justice Brennan, writing in *Neil, Warden* v.

Biggers, 409 US 188 (1972) at page 203 thereof, when he stated:

> The "two-court" rule . . . rests upon more than mere deference to the trier of fact who has a first hand opportunity to observe the testimony and to gauge the credibility of the witnesses. For the rule also serves as an indispensible judicial "time-saver" making it unnecessary for this Court to waste scarce time and resources on minor factual questions which have already been accorded consideration by two Federal Courts and whose resolution is without significance except to the parties immediately involved.

CONCLUSION

Petitioners' request for the issuance of a writ of certiorari, viewed objectively, is nothing more than a request for a fourth review of the evidence in this case.

A reading of the opinions of both the District Court and the Court of Appeals makes it obvious that the standard required under the laws of Kansas was applied in determining the sufficiency of Respondent's evidence.

The writ should be denied.

Respectfully submitted,

CHARLES S. SCHNIDER
JOHN E. SHAMBERG
of the Firm of
SCHNIDER, SHAMBERG & MAY
4210 Johnson Drive
205A Fairway Office Building
Shawnee Mission, Kansas 66205

and

FORREST E. SHORT
JOEL BRADLEY SHORT
CHARLES GENTRY
of the Firm of
SHORT AND SHORT
4 Louderback Building
Fort Scott, Kansas 66701

Attorneys for Respondent

CERTIFICATION

I certify that on this 2nd day of March, 1976, three true and correct copies of the above and foregoing Brief in Opposition to Petition for a Writ of Certiorari were placed in the United States mail, postage prepaid, to Weeks, Thomas, Lysaught, Bingham & Mustain, Chartered, Home State Bank Building, Minnesota Avenue at Fifth, Kansas City, Kansas 66101 and to Donald E. Willson, 1720 South Bellaire Street, Denver, Colorado 80222, attorneys for petitioners. All parties required to be served have been served.

FORREST E. SHORT
Attorney for Respondent